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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 151

BANKERS TRUST COMPANY and LEONARD M. WALLSTEIN, as Executors of the Will of CHARLES NEWMAN, Deceased, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court on motion for summary judgment (R. 19a-31a)[1] and on motion for relief from judgment (R. 46a-50a) are reported at 190 F. Supp. 671 and 191 F. Supp. 792, respectively. The opinion of the court of appeals (Pet. 19-20) is reported at 299 F. 2d 936.

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[1] "R." references are to the appendix to the petitioners' brief filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1962. (Pet. 19.) The petition for a writ of certiorari was filed on June 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in determining the net estate for federal estate tax purposes, a deduction is allowable under Section 812(d) of the Internal Revenue Code of 1939, for a bequest of a charitable remainder which is to take effect only in the event that a childless 47-year old woman, the life beneficiary, does not leave surviving issue.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

> SEC. 812. NET ESTATE.
>
> For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—
>
> * * * *
>
> (d) *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes * * *.
>
> * * * *

Treasury Regulations 105 (1939 Code):

> Sec. 81.46. *Conditional bequests.*—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

* * * *

STATEMENT

Charles Newman died on October 26, 1950, leaving some $83,000 in trust,[2] the income to be paid to Anne Marie Hughes for life and the corpus then to be distributed "to and among the issue of said Anne Marie Hughes, her surviving" or, if none, to an exempt charitable organization. (R. 19a.)

Anne Marie Hughes had been the testator's devoted private secretary for the 30 years preceding his death. She was 47 years of age at the time of the testator's death on October 26, 1950. She had been married for 17 years and was childless. Mrs. Hughes stated,

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[2] The trust had been created *inter vivos*, but was includible in the decedent's gross estate because he had retained a life interest and a power to revoke. His will made an addition to the existing trust.

in her deposition, that on October 26, 1950, neither she nor her husband was aware of any physical impediment which might have prevented her from bearing children. (R. 19a.)

The executors included the principal of the trust in the decedent's gross estate but claimed a deduction under Section 812(d) of the Internal Revenue Code of 1939 for the value of the remainder after Mrs. Hughes' life as a gift to charity. The Commissioner disallowed the deduction and the executors, having paid the resulting deficiency, in due course brought this suit for refund. (R. 19a-20a, 27a.)

The district court granted summary judgment for the government, holding that the deduction could not be allowed because the chance that the charity might not receive the contingent remainder of the trust was not "so remote as to be negligible" within the meaning of Treasury Regulations 105, Section 81.46. (R. 25a-26a.) In denying petitioners' motion for relief from judgment, the court noted that, in their effort to prove a remote possibility, petitioners had failed to demonstrate that the statistical data offered by them was not reasonably subject to "the distorting effect * * * of the volitional element and the possible inducement to have progeny." (R. 48a.) The court of appeals affirmed, *per curiam*, "on the studiously reasoned opinions of Judge Palmieri below." (Pet. 20.)

ARGUMENT

The courts below applied settled legal standards, no conflict of decisions exists, and there is no other ground justifying further examination by this Court.

1. A deduction for a contingent bequest to charity is allowable under Section 812(d) of the Internal Revenue Code of 1939 and Treasury Regulations 105, Section 81.46, *supra*, p. , only if the possibility of the charity not taking "is so remote as to be negligible." The uncertainties normally engendered by a precedent event preclude deduction unless they are so improbable that, for all practical purposes, they may be disregarded. *United States* v. *Dean*, 224 F. 2d 26, 29 (C.A. 1st). Any element of individual volition which may affect the probability of the precedent event occurring must be taken into account (*Commissioner* v. *Sternberger's Estate*, 348 U.S. 187), since individual motivations create uncertainties "appreciably greater than the general uncertainty that attends human affairs" (*Ithaca Trust Co.* v. *United States*, 279 U.S. 151, 154). This is especially true where there exists an inducement to fulfill the conditions of the precedent event in order to receive the full benefit of the bequest and thus defeat the charitable gift.

Petitioners relied exclusively upon statistical data in attempting to prove the remoteness of the possibility that Mrs. Hughes might leave a surviving issue and thereby defeat the contingent gift to charity. The district court, while accepting the relevance of such data, held that recognition must also be given "to the distorting effect upon the statistical data of the volitional element and the possible inducement to have progeny." (R. 26a.) Mrs. Hughes' testimony indicated that there existed no known physical

impediment, and that prior to decedent's death she had not wanted to leave his employ in order to raise a child. (R. 5a.) On that basis, the district court correctly concluded that the evidence did not demonstrate that Mrs. Hughes' chances of leaving surviving issue were so remote as to be negligible.

2. Petitioners' assertion that the courts below misapplied the legal principle set forth in the *Sternberger* case by demanding certainty that the charity would receive the bequest (Pet. 8-11, 12-16) is without merit. The district court explicitly rejected any requirement of absolute certainty that the charity will take by saying (R. 21a-22a):

> However, plaintiff's failure to rebut the existence of the bare physical possibility of issue is not necessarily fatal to their claim. For, under the applicable Regulations, the test is whether the possibility, assuming that it did exist, was "so remote as to be negligible."

3. Finally, petitioners assert a conflict with *United States* v. *Dean*, *supra*, on the usage of the statistical data. In *Dean*, only the question of longevity—life taking its natural course—was involved. There was no possibility of individual volition (except for suicide, which the court declined to consider) interacting to defeat the charitable bequest. Indeed, the Court of Appeals for the First Circuit there articulated the distinction between *Dean* and the present case (224 F. 2d., p. 28):

> In the present situation, then, *statistical data is not subject to distortion by any individual's self-interest*, and since mortality tables are generally

> recognized as reliable and have long been used in the courts in tax and other cases, it follows that recognized principles of the actuarial art can safely be relied upon to cope with the contingency that charity will take in this particular case. [Emphasis supplied.]

In the *Sternberger* case, this Court made it clear that statistical data was "less dependable" where the controlling event could be affected by individual volition. *Commissioner* v. *Sternberger's Estate*, 348 U.S. 187, 198.

In view of its holding that the more than negligible possibility of natural children surviving Mrs. Hughes defeated the claimed deduction, the district court did not find it necessary to consider at length the government's alternative position that the term "issue" as used in the trust indenture included, under New York law, an adopted child. (R. 26a.) Subsequent decisions of the New York courts have held that the term "issue" includes a child adopted after the testator's death. *In re Hulbert's Will*, 213 N.Y.S. 2d 385 (1961); *In re Lynde's Estate*, 211 N.Y.S. 2d 493 (1961); *In re Ward's Will*, 9 App. Div. 2d 950, 195 N.Y.S. 2d 933, affirmed, 9 N.Y. 2d 722 (1961).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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